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No. 08-1356

In the Supreme Court of the United States

SUNGWOOK KIM,

Petitioner,

v.

ERIC H. HOLDER, JR.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF CAPITAL AREA IMMIGRANTS' RIGHTS COALITION AND CASA DE MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CAPITAL AREA IMMIGRANTS' RIGHTS COALITION AND CASA DE MARYLAND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae Capital Area Immigrants' Rights (CAIR) Coalition is an association of legal organizations, advocacy groups, and social service providers serving the immigrant community in the Washington, D.C. metropolitan area. CAIR was first formed in 1987, under the auspices of the Lawyers Committee for Civil Rights and Urban Affairs, and became an independent non-profit organization in 2000. The CAIR Coalition acts as the primary source of legal representation for detained immigrants in the Washington metropolitan area – including many legal permanent residents awaiting removal proceedings and deportation.

As Maryland's largest non-profit organization focused on the rights of immigrants, *amicus curiae* CASA de Maryland, Inc. has sought since 1987 to create economically and ethnically diverse communities in which all people can participate and benefit fully, regardless of their immigration status. CASA upholds this vision by, among other things, providing employment placement, vocational

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici* to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

training, financial literacy programs, English for Speakers of Other Languages instruction, citizenship classes, legal services, health education, social services, and community organizing. In addition, CASA's legal department has a deep commitment to protecting and advancing the rights of immigrants in Maryland through civil rights impact litigation.

Because of their extensive advocacy and legal work on behalf of immigrant communities in the Washington metropolitan area, *amici* have a keen interest in the fair and just administration of the nation's immigration laws. Accordingly, *amici* urge the Court to grant Mr. Kim's petition for certiorari, reverse the Eighth Circuit's decision below, and vacate the Immigration Judge's order of removal.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court recognized nearly a century ago that the deportation of one who "claims to be a citizen obviously deprives him of liberty." *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922). These due process considerations are no less weighty in the case of an alien who has obtained lawful permanent resident ("LPR") status. See *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306, 309-310 (1970). Congress recognized as much when it established a five-year limitations period within which the Attorney General must act to rescind the LPR status of an alien who, at the time, was not eligible for adjustment to such status. See 8 U.S.C. 1256(a). The limitations period, and the due process interest it protects, are meaningless if the Attorney General can ***remove*** an alien more than five years after he obtained LPR status on the ground that the alien was ineligible for that status.

Section 1256(a) of the Immigration and Nationality Act ("INA") unambiguously applies to proceedings brought by the Attorney General to revoke an alien's status as a lawful permanent resident ("LPR") on the ground that the alien was not eligible for LPR status. The question whether the five-year limitations period also applies to removal proceedings based on a lack of eligibility for LPR status, however, has directly split the circuit courts. In this case, the petitioner, Mr. Sungwook Kim, was granted LPR status in 1992. Pet. 4. Unbeknownst to Mr. Kim, persons holding themselves out as attorneys who handled his LPR application apparently bribed a then-agent of the Immigration and Naturalization Service ("INS", now known as the U.S. Citizenship and Immigration Services division of the Department of Homeland Security) to secure the approval of Mr. Kim's application. Eleven years later, after the INS agent admitted to accepting bribes in exchange for approving LPR applications, the government initiated removal proceedings against Mr. Kim on the ground that he was not an LPR and therefore was not admissible into the United States. Pet. 5.

The Eighth Circuit held that Section 1256(a) did not reach Mr. Kim's situation, reasoning that the limitations period "appl[ies] to the rescission of status adjustments" only, "not [to] removal proceedings." Pet. 8a. In so holding, the court rejected Mr. Kim's argument that, by not applying the five-year statute of limitations to removal proceedings where the government seeks to deport an LPR because he or she was improperly granted an adjustment of status, the court effectively would write the limitations period of Section 1256(a) out of

existence. The Eighth Circuit thus affirmed the Immigration Judge's decision to remove Mr. Kim. Pet. 13a.

The Eighth Circuit expressly declined to follow, and its holding squarely conflicts with, the conclusion reached by the Third Circuit in *Bamidele* v. *INS*, 99 F.3d 557 (3d Cir. 1996) and reiterated in *Garcia* v. *Attorney General*, 553 F.3d 724 (3d Cir. 2009). See Pet. 7a. At the same time, the Eighth Circuit aligned itself with the conclusion reached by the Ninth Circuit in earlier cases. See Pet. 8a. The decision below thus deepens an existing circuit split on a frequently recurring question of statutory interpretation.

The Eighth Circuit's holding also highlights and exacerbates a related, broader split among the circuit courts. In reaching its decision, the court below relied heavily on a 1962 opinion from the Attorney General interpreting Section 1256(a) as applying only to rescission proceedings. See Pet. 8a-9a (citing *Matter of S--*, 9 I. & N. Dec. 548, 548 (Att'y Gen. 1962)). Like the Fourth Circuit in *Asika* v. *Ashcroft*, 362 F.3d 264, 270-271 (4th Cir. 2004), the Eighth Circuit found that the Attorney General's interpretation was entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). By contrast, both the Second and Third Circuits have held that the Attorney General's interpretation of Section 1256(a) does ***not*** warrant *Chevron* deference, because "[a] statute of limitations is not a matter within the particular expertise of the INS." *Bamidele*, 99 F.3d at 561 (internal quotation omitted); accord *Iavorski* v. *INS*, 232 F.3d 124, 133 (2d Cir. 2000). These courts instead have held that the limitations period

is "a clearly legal issue that courts are better equipped to handle." *Bamidele*, 99 F.3d at 561 (quoting *Dion v. Sec'y of HHS*, 823 F.2d 669, 673 (1st Cir. 1987).

The circuit split over the role of *Chevron* in interpreting the limitations provisions of Section 1256(a) is an offshoot of a larger split over when deference is due to agency interpretations of the INA. Interpretive and other legal questions abound in INA cases, and the Courts of Appeals are in fundamental disagreement as to whether *Chevron* deference applies to pure questions of law arising under the immigration statutes. Some hold that *Chevron* applies across the board, while others have ruled that deference is due only where an ambiguous statute implicates policy considerations that are within the agency's area of expertise.

The importance of this split is heightened by the fact that, if *Chevron* deference does not apply, ambiguities in the INA must be resolved in accordance with the rule of lenity. That canon of interpretation, which counsels that ambiguous statutory provisions must be construed in favor of the alien, is squarely at odds with the outcome that would be reached by applying *Chevron* deference in the vast majority of immigration cases that reach the federal courts.

Moreover, the constitutional requirement that Congress implement a "uniform rule of naturalization," the frequently unreliable nature of decision-making in the immigration courts, and the severe and apparently arbitrary way that removal actions affect green-card holders in situations like Mr. Kim's further demonstrate the importance of

resolving the circuit split over the application of *Chevron* in the INA context.

ARGUMENT

I. The Petition Illuminates Two Mature Circuit Splits That Promise To Endure Until This Court Resolves Them.

A. The Courts Of Appeals Have Sharply Divided On The Applicability Of Section 1256 To Removal Actions.

The disagreement among the circuit courts over the scope of the five-year limitations period is direct and unavoidable. On the basis of a 1997 amendment to the limitations provision, the Eighth Circuit's decision stated squarely that the "plain meaning" of the statute compels the conclusion that "rescission [of status] and removal [are] separate" and that the limitations period only applies to the former. Pet. 8a. The Eighth Circuit's decision conforms with cases in the Ninth Circuit that read Section 1256 to "plainly, unequivocally and unambiguously" mean that "Congress has seen fit to do away with statutes of limitation with regard to deportation proceedings." *Oloteo* v. *INS*, 643 F.2d 679, 682-683 (9th Cir. 1981); see also, *e.g.*, *Choe* v. *INS*, 11 F.3d 925, 928 n.4 (9th Cir. 1993) ("The bottom line is [Section 1256] does not prevent the removal of adjusted aliens."); *Monet* v. *INS*, 791 F.2d 752, 754 (9th Cir. 1986) (extending "*Oloteo* to exclude application of the five year limitations period to deportation proceedings regardless of the method of the alien's admission").

By contrast, the Third Circuit in *Bamidele* concluded that "the running of the limitation period bars the rescission of * * * permanent resident status and, in the absence of the commission of any other

offense, thereby bars initiation of deportation proceedings." 99 F.3d at 563. In *Garcia*, the Third Circuit held that the 1997 amendment cited in the opinion below "does not invalidate nor modify nor refer in any respect to the statutory language 'within five years' after the adjustment." 553 F.3d at 728. Rather, the amendment's text included only "two clear provisions," which allowed removal without rescission and permitted automatic rescission upon the entry of a removal order. *Ibid.*

The Eighth and Third Circuits have, in fact, expressly recognized the existence of this irreconcilable conflict. See Pet. 7a; *Garcia*, 553 F.3d at 728; *Bamidele*, 99 F.3d at 563 & n.8. But the confusion among the circuits on this question does not stop there.

The Fourth Circuit has taken a third approach. In *Asika*, that court held that Section 1256 "provides no express guidance whatsoever on the * * * question of whether the five-year limitation on rescission actions must also apply to deportation actions." 362 F.3d at 269. As such, although the Fourth Circuit believed that the Third Circuit's reading possessed "some force," it held that "the statute does not speak unambiguously to the precise question at issue." *Id.* at 270.[2]

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[2] In reaching this impasse, the circuit courts have disagreed whether applying the five-year limitations period only to pure rescission actions comports with the principal that statutes must be construed to give effect to all of their provisions. The Third Circuit has held that failing to apply the limitations period in circumstances like Mr. Kim's would "construe the limitations period] out of existence." *Bamidele*, 99 F.3d at 564. The Fourth Circuit rejected this reading of the statute, reasoning that the limitations period provides "an important safeguard to

The circuits have, in other words, variously held (1) that the limitations period in Section 1256 applies to removal actions based on prior ineligibility for status adjustments, (2) that the statutory language compels the opposite conclusion, and (3) that the language is ambiguous. Thus, among the four circuits to decide the issue, all three realistically conceivable positions on the meaning of the statute have been taken.

Further, the question whether Section 1256 ever applies to removal actions promises to endure absent this Court's intervention. Situations potentially implicating the five-year limitations period arise not only when a rogue INS agent accepts bribes, but also in cases of actual "fraud" on the part of the applicant and in cases of agency "error." *Savoury* v. *Att'y Gen.*, 449 F.3d 1307, 1316 (11th Cir. 2006). Indeed, at least three other circuits have been presented with factually similar suits that could have, but did not, raise the issue of the applicability of Section 1256. See, *e.g.*, *Omar* v. *INS*, 266 Fed. Appx. 37 (2d Cir. 2008) (confronting a situation in which an alien given LPR status more than five years previously was ordered removed because he was ineligible for the status at that time); *Savoury*, 449 F.3d 1307 (same); *Sanchez* v. *Winfrey*, 134 Fed. Appx. 720 (5th Cir. 2005) (same). The Third and Ninth Circuits also repeatedly have been confronted with cases presenting similar facts. See Pet. 18 n.7. The time is thus ripe for this Court to resolve the question.

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aliens," because "rescission proceedings"—unlike "deportation proceedings"—give aliens "few, if any, procedural protections." *Asika*, 362 F.3d at 270.

B. The Courts Of Appeals Also Have Inconsistently Applied *Chevron* And The Rule Of Lenity When Reviewing Agency Interpretations Of The INA.

The Eighth Circuit's decision also exacerbates a second split that exists among the circuits. This split concerns whether or not agency determinations of purely legal questions—such as the construction of a statute of limitations—deserve *Chevron* deference.

In *Chevron*, of course, this Court formulated a two-step test for determining whether to defer to an agency's interpretation of a statute whose meaning is contested. The first step requires that courts use "traditional tools of statutory construction" to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842 & 843 n.9. If not, then courts may proceed to the second step and determine whether the agency's interpretation is "reasonable." *Id.* at 845. If it is, the agency's interpretation must be affirmed.

In holding that the limitations period in Section 1256 applies in removal actions, the Third Circuit determined that "[a] statute of limitations is not a matter within the particular expertise of the INS" but instead presents "a clearly legal issue that courts are better equipped to handle." *Bamidele*, 99 F.3d at 561 (quoting *Dion*, 823 F.2d at 673). Accordingly, the Third Circuit expressly declined to give the INS "any presumption of special expertise" in the interpretation of 8 U.S.C. 1256(a). *Id.* at 562 (quoting *U.S. Dep't of the Navy* v. *Fed. Labor Relations Auth.*, 840 F.2d 1131, 1134 (3d Cir. 1988). The court adhered to this stance in *Garcia*. See 553 F.3d at 727-728.

The Eighth Circuit in this case, by contrast, chose to apply *Chevron* and "defer to the Attorney General's interpretation of the statute" "[t]o the extent there is any doubt as to [its] plain meaning." Pet. 8a-9a. In doing so, the Eighth Circuit leaned heavily on the Fourth Circuit's analysis in *Asika*. That court, in turn, recognized that there was "some force" to the argument that the five-year limitations period should apply to removal claims like Mr. Kim's. 362 F.3d at 270. Nevertheless, it held that this "is not the *only* way in which the Act may be interpreted to give independent effect to [Section 1256(a)]." *Ibid.* (emphasis in original). Because the Fourth Circuit believed that the statute was open to multiple interpretations, it held that its "inquiry under *Chevron* [was] simply to ask whether the Attorney General's position 'is based on a permissible construction of the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

The confusion regarding *Chevron*'s applicability to agency interpretations of the INA runs even deeper, in two ways. First, the conflict reaches cases interpreting provisions of the INA other than the limitations period in Section 1256(a). Whenever a question may be characterized as a pure question of law outside the expertise of Citizenship and Immigration Services, the same question of *Chevron*'s applicability is presented. Unsurprisingly, the courts that have considered the question in other contexts have taken two very different approaches.

The Second Circuit, for example, has held in an INA case that "[b]ecause the issue of whether a limitations period creates a jurisdictional bar to untimely claims is itself a question purely of statutory construction, it fits squarely within the

initial step in the *Chevron* analysis." *Iavorski*, 232 F.3d at 133. There was thus no "danger of venturing into areas of special agency expertise" and no "special deference" was due under *Chevron*. *Ibid.* Similarly, in determining whether a provision of the Antiterrorism and Effective Death Penalty Act applied retroactively, the Tenth Circuit squarely held that "[d]etermining the statute's temporal reach does not involve any special agency expertise." *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1147-1148 (10th Cir. 1999). As such, the court analyzed the issue "without affording any deference to the Attorney General." *Id.* at 1148. The First, Sixth, and Eleventh Circuits likewise have concluded that deference is unwarranted when pure questions of statutory interpretation are at issue. See *Pak* v. *Reno*, 196 F.3d 666, 675 n.10 (6th Cir. 1999); *Mayers* v. *INS*, 175 F.3d 1289, 1302 (11th Cir. 1999); *Goncalves* v. *Reno*, 144 F.3d 110, 127 (1st Cir. 1998).

Like the Fourth and Eighth Circuits, however, the Seventh Circuit has applied *Chevron* deference to numerous questions that arguably are pure matters of law. See, *e.g.*, *Sherifi* v. *INS*, 260 F.3d 737, 740 (7th Cir. 2001) (applying *Chevron* to BIA's position on the retroactive application of an amendment to the INA); *Henry* v. *INS*, 8 F.3d 426, 434 (7th Cir. 1993) (applying *Chevron* to BIA's interpretation of the statutory requirements for a waiver of deportation).

The circuit split over the application of *Chevron* therefore goes well beyond the Section 1256 context to infect many issues decided under the INA. In particular, the courts have directly divided on the question whether to defer to the agency's determination that particular INA provisions are or

are not retroactive. Compare, *e.g.*, *Pak*, 196 F.3d at 675 n.10 (no *Chevron* deference), *Jurado-Gutierrez*, 190 F.3d at 1148, and *Goncalves*, 144 F.3d 110 (no *Chevron* deference), with *Sherifi*, 260 F.3d at 740 (affording *Chevron* deference). To take another example, the BIA frequently is required to decide whether a particular criminal offense constitutes an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43). The Tenth Circuit has held that such determinations are entitled to *Chevron* deference, *Tapia Garcia* v. *INS*, 237 F.3d 1216, 1221 (10th Cir. 2001), while the Third Circuit has reached the opposite conclusion, *Patel* v. *Ashcroft*, 294 F.3d 465, 467 (3d Cir. 2002).

Both of these approaches to *Chevron* actually trace to a common source—this Court's opinion in *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). There, this Court held that whether the "well-founded fear" standard for asylum in 8 U.S.C. 1158(a) and the "clear probability" standard for withholding of deportation in 8 U.S.C. 1253(h) were identical was a "pure question of statutory construction for the courts to decide." *Id.* at 445-446; see also, *e.g.*, *Goncalves*, 144 F.3d at 127 (quoting this language). *Cardoza-Fonseca* also reiterated, however, that *Chevron* deference is appropriate when a court is confronted with a "question of interpretation * * * in which the agency is required to apply * * * standards to a particular set of facts." 480 U.S. at 448.

The split over the appropriateness of *Chevron* deference in INA cases presenting pure questions of law also is deep in a substantive sense. If the INS brings a removal proceeding against an alien and the immigration judge refuses to order removal, the agency's usual recourse is to appeal to the BIA and

then petition the Attorney General. See 8 C.F.R. 3.1(h)(1)(i)-(iii). As a result, only aliens typically appeal to a federal court. Almost all deportation cases that reach the federal courts, therefore, involve an agency determination that interprets the INA contrary to the alien's interest. As such, deference to the agency's view under *Chevron* in INA cases almost uniformly leads to interpretations of the statute that run directly counter to the alien's interests. Courts that decline to apply *Chevron* deference in the INA context, on the other hand, will apply the full panoply of interpretive tools when presented with a question of law that falls fully within the province of the courts.

While this much is true in many administrative cases, the question of whether *Chevron* deference is warranted is particularly important in the INA context, because a presumption in favor of the alien otherwise would apply. As this Court first articulated over sixty years ago, the rule of lenity applies in INA cases "because deportation is a drastic measure and at times the equivalent of banishment or exile." *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). As such, when the immigration laws are of uncertain meaning, those "doubts" are "resolve[d] * * * in favor of" the alien. *Ibid.* The rule of lenity has, in fact, become a staple of this Court's INA jurisprudence when it interprets statutes that can lead to deportation or criminal penalties. See, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001); *Cardoza-Fonseca*, 480 U.S. at 449; *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Bonetti* v. *Rogers*, 356 U.S. 691, 699 (1958).

Thus, both *Chevron* deference and the rule of lenity are deeply embedded in this Court's jurisprudence. This Court's post-*Chevron* immigration cases also are consistent: The Court has twice declined to defer to the agency's statutory interpretation and cited the rule of lenity in both decisions, which involved the purely legal questions of retroactivity and the potential equivalence of two standards. See *St. Cyr*, 533 U.S. 289; *Cardoza-Fonseca*, 480 U.S. 421. In a third case, which involved the question of whether particular factors had to be weighed in making a deportation decision and therefore did not present a pure question of law, the Court held that the BIA's interpretation was entitled to *Chevron* deference and made no mention of the rule of lenity. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999). But even as this Court's cases have been consistent, its guidance to the lower courts has been restricted to the sentences of *Cardoza-Fonseca* quoted above, and the lower courts have not reached a consensus.

Thus, in cases presenting pure questions of law, the circuit courts currently see a choice between competing interpretive presumptions that are almost certain to lead to contrary results. As the Second Circuit put it, on the one hand, "[l]ingering ambiguities in a statute concerning the forfeiture of residence in this country should be resolved in favor of the alien." *Ali* v. *Reno*, 22 F.3d 442, 446 (2d Cir. 1994) (internal citations omitted). But "[o]n the other hand, a court will accord substantial deference to an agency's construction of regulations * * * ." *Ibid.* (internal citations omitted).

The circuits have not reached a uniform reconciliation of these competing principles in immigration cases. See, *e.g.*, *Rosario* v. *INS*, 962

F.2d 220 (2d Cir. 1992) (applying *Chevron* to the agency's interpretation of the statutory requirements for relief from deportation, but rejecting that interpretation based in part on the rule of lenity); *De Osorio* v. *INS*, 10 F.3d 1034, 1036 (4th Cir. 1993) (applying both *Chevron* and the rule of lenity, and upholding the agency's view regarding the retroactivity of an amendment to the INA); *Omar* v. *INS*, 298 F.3d 710, 715-716 (8th Cir. 2002), *overruled in part on other grounds by Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (holding that *Chevron* did not apply but omitting to consider rule of lenity in upholding BIA's determination that immigrant's criminal conviction constituted an "aggravated felony"); *Naderpour* v. *INS*, 52 F.3d 731 (8th Cir. 1995) (applying rule of lenity and concluding that appeal to BIA was timely, without considering whether agency's interpretation of the applicable rules was entitled to *Chevron* deference).

The Court can bring much needed clarity to this area of the law by granting the petition and confirming, on the one hand, that *Chevron* does not apply to agency interpretations involving pure questions of law, while on the other hand, the rule of lenity requires that ambiguous provisions of the INA be construed in the manner favoring the immigrant, particularly when the provision in controversy may lead to deportation.

II. The Petition Raises Important And Recurring Issues That, If Resolved By This Court, Will Promote Fairness And Consistency In The Application Of The Immigration Laws.

While any conflict among the courts of appeals on a matter of federal law is a matter for concern,

certiorari review is particularly appropriate where the circuits are squarely at odds regarding the application of the nation's immigration laws. Such a split provides conflicting guidance to the BIA about whether particular interpretations of the immigration laws will be upheld on appeal. Because courts of appeals disagree on whether a five-year statute of limitations applies to removal proceedings brought against a legal permanent resident on grounds that he or she was not eligible for an adjustment of status, the BIA presently is confronted with contradictory authority on the same rule of law.

Moreover, the Constitution requires Congress to implement a "uniform rule of naturalization." U.S. Const. art. I, § 8, cl. 4; see also *Graham* v. *Richardson*, 403 U.S. 365, 382 (1971) (acknowledging that the Naturalization Clause imposes an "explicit constitutional requirement of uniformity" in the execution of "laws on the subject of citizenship"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 537 (2001) (arguing that the Constitution permits Congress to exercise the immigration power "only in a manner that is geographically consistent across the nation"). Disagreement regarding the proper interpretation of Section 1256(a), the applicability of *Chevron* to provisions of the INA that raise purely legal questions, and how to reconcile the rule of lenity with *Chevron* deference has resulted in serious confusion in the lower courts and dramatic variation in the administration of the Nation's immigration laws.

A certiorari grant is especially appropriate in this case for two further reasons. First, the issue of

whether *Chevron* deference is warranted in cases presenting pure questions of law under the INA is especially deserving of this Court's time because it is clear that, as a general matter, many of the stewards of the country's immigration system are not deserving of judicial deference. As Judge Posner unhappily observed, the "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice" and, as a result, the Seventh Circuit reverses the BIA about 40% of the time. *Benslimane* v. *Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005). It understates the issue to say that Judge Posner's view is widely shared.[3]

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[3] See *Bah* v. *Mukasey*, 529 F.3d 99, 111 (2d Cir. 2008) ("[W]e are deeply disturbed by what we perceive to be fairly obvious errors in the agency's application of its own regulatory framework. Congress has entrusted the agency with the weighty and consequential task of granting safe harbor to the deserving of those who flee to this country for protection. The claims of the petitioners before us, as set forth below, did not receive the type of careful analysis they were due"); *N'Diom* v. *Gonzales*, 442 F.3d 494, 500 (6th Cir. 2006) (Martin, J., concurring) (observing "the significantly increasing rate at which adjudication lacking in reason, logic, and effort" reaches the federal courts); *Ming Shi Xue* v. *BIA*, 439 F.3d 111, 114 (2d Cir. 2006) ("[T]he position of overburdened immigration judges and overworked courts has become a matter of wide concern."); *Chen* v. *Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (finding that the Immigration Judge's holding was "grounded solely on speculation and conjecture"); *Wang* v. *Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("The tone, the tenor, the disparagement, and the sarcasm of the IJ seem more appropriate to a court television show than a federal court proceeding."); *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135, 154-55 (3d Cir. 2005) (noting the IJ's "hostile" and "extraordinarily abusive" behavior toward petitioner "by itself would require a rejection of his credibility finding"); *Korytnyuk* v. *Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's con-

Second, as this Court repeatedly has recognized, deportation is a severe punishment with far-reaching consequences. See, *e.g.*, *Cardoza-Fonseca*, 480 U.S. at 449 ("[D]eportation is always a harsh measure."); *Ng Fung Ho*, 259 U.S. at 284 (deportation may "result * * * in loss of both property and life, or of all that makes life worth living"). This is particularly true for legal permanent residents who have enjoyed LPR status for more than five years. By that point, permanent residents, like Mr. Kim, have developed deep ties of work, family, and friendship that make deportation an exceptionally harsh sanction. This is even more true when—as in the case of Mr. Kim—the government rescinds LPR status and initiates deportation proceedings for reasons completely unrelated to any misconduct by the alien.

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clusion, not [the petitioner's] testimony, that 'strains credulity'"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) ("This very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Kourski* v. *Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) ("There is a gaping hole in the reasoning of the board and the immigration judge."); *Elias* v. *Gonzales*, 490 F.3d 444, 452 (6th Cir. 2007) (noting that the IJ's "intemperate" manner and sarcasm with petitioner "raised substantial questions as to his bias and hostility toward" the asylum applicant); *Sholla* v. *Gonzales*, 492 F.3d 946, 952 (8th Cir. 2007) (IJ denied asylum even though "the record compels any reasonable factfinder to conclude that [the applicant] suffered past persecution on a protected ground"); *Mece* v. *Gonzales*, 415 F.3d 562, 572 (6th Cir. 2005) ("The Board's failure to find clear error in the immigration judge's adverse credibility determination leaves us, we are frank to say, more than a little puzzled."); *Iao* v. *Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) ("The immigration judge's opinion cannot be regarded as reasoned."); *Recinos de Leon* v. *Gonzales*, 400 F.3d 1185, 1189 (9th Cir. 2005) ("[I]t is impossible for us to decipher what legal and factual reasons support the IJ's decision.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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